Filed 2/6/03 P. v. Wohl CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. STEVEN JOSEPH WOHL, Defendant and Appellant.	B157456 (Super. Ct. No. NA049406)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joan Comparet-Cassani, Judge. Affirmed.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Steven Joseph Wohl appeals from the judgment following a jury trial in which he was convicted of second degree murder, evading a peace officer causing death, driving under the influence of alcohol causing death, driving with a .08 or more percent blood alcohol content causing death, evading a peace officer, and hit-and-run driving. Defendant was sentenced to prison for 15 years to life consecutive to 6 months. Defendant contends: the trial court erred in failing to instruct the jury on his defenses of mistake of fact and necessity; excluding testimony regarding a traffic stop in 1996 by the pursuing police officer; and sentencing him to a consecutive term for hit-and-run driving. We affirm.

PROCEDURAL BACKGROUND

Defendant was charged in an information with: the murder of Bradley Wadds Morton in violation of Penal Code section 187, subdivision (a);[1] evading a peace officer causing the death of Morton in violation of Vehicle Code section 2800.3; driving under the influence of alcohol causing the death of Morton in violation of Vehicle Code section 23153, subdivision (a); driving with a .08 or more percent blood alcohol content causing the death of Morton in violation of Vehicle Code section 23153, subdivision (b); evading a peace officer in violation of Vehicle Code section 2800.2, subdivision (a); and misdemeanor hit-and-run driving causing property damage in violation of Vehicle Code section 20002, subdivision (a).

Defendant was convicted of all offenses. Defendant was sentenced to prison for 15 years to life consecutive to 6 months: 15 years to life for second degree murder; 4 years for evading a peace officer causing death, stayed pursuant to Penal Code section 654; 2 years each, stayed pursuant to Penal Code section 654, for driving under the influence, driving with a .08 or more percent blood alcohol content causing death, and evading a peace officer; and 6 months for hit-and-run driving. This timely appeal followed.

---

[1] Defendant was tried for unlawfully killing Morton on two theories: (1) with malice aforethought; and (2) during the commission or attempted commission of the crime of felony evasion of an officer.

FACTS

At 2:00 a.m. on June 23, 2001, Long Beach Police Department Motorcycle Officer John Clark was stopped on Ocean Boulevard between 3rd Place and Bonito Avenue. He wore a motorcycle officer's uniform and a black and white police motorcycle helmet. The rear red and blue strobe light on Officer Clark's motorcycle was flashing.[2] Driving east on Ocean Boulevard in his Corvette, defendant approached Officer Clark at 50 miles per hour. The speed limit was 30 miles per hour. Defendant's blood alcohol content was .14 percent.[3] Defendant quickly slowed to 20 miles per hour when he saw Officer Clark. Officer Clark waved his lit flashlight toward defendant to pull defendant over to the curb. Officer Clark made eye contact with defendant, who was within seven feet of Officer Clark. Officer Clark told defendant, through the Corvette's rolled-down windows, to pull over to the curb. Defendant passed Officer Clark slowly and then suddenly accelerated rapidly. Officer Clark got on his motorcycle and pursued defendant. Officer Clark activated his siren and all his lights. Defendant turned north on Orange Avenue, accelerating to a high rate of speed. Defendant turned east on 2nd Street, but Officer Clark did not follow, because 2nd Street was a one-way street going west. Instead, Officer Clark drove east on Broadway, which is parallel to 2nd Street. Officer Clark deactivated the siren as he drove east on Broadway, but kept the lights flashing. Officer Clark next observed defendant on Gaviota Avenue going south toward Ocean Boulevard. Officer Clark turned on Gaviota Avenue to follow. Officer Clark reactivated the siren and kept it on. Defendant turned west onto Ocean Boulevard. Defendant drove at up to 50 miles per hour, an unsafe sped, in an unsafe manner. Defendant turned north on Falcon Avenue. Officer Clark lost sight of defendant.

---

[2] The motorcycle's other lights—a standard tail-light and headlight, emergency lights, a rear strobe light, and a front red and blue strobe light—were not activated at that time.

[3] The legal blood alcohol content is .08 percent.

At Falcon Avenue and 2nd Street, defendant hit a Mitsubishi van and a Honda Accord. Officer Clark heard the crash and the sounds of defendant revving his engine. He arrived at the scene as defendant was making a turning maneuver. Officer Clark got off his motorcycle and walked towards defendant. He pointed his gun at defendant. He told defendant to stop, it was "over," and defendant needed to stop before someone got hurt. Officer Clark testified he was frightened and his adrenalin was pumping. He might have said, "stop or I'll shoot." Officer Clark got as close as six feet from defendant, on the passenger side of defendant's car. The car windows were open. As Officer Clark was giving orders to defendant, defendant drove forward and backward, trying to maneuver the car around. Defendant replied he was just going to park his car. As soon as defendant managed to turn the car, he took off westbound on 2nd Street, accelerating to 35 miles per hour in a 25 mile per hour zone. Officer Clark called for backup. Mariano Venegas observed the encounter from his first floor apartment on 2nd Street. Venegas confirmed Officer Clark's description of the encounter. Venegas testified Officer Clark shouted to defendant, "stop or I'll shoot" in addition to "get [out of] the vehicle."

From 2nd Street, defendant turned the wrong way onto Esperanza Avenue. Officer Clark tried to follow defendant, but could not locate him. Defendant drove west on 4th Street and passed Long Beach Police Department Officer Paul Esko's marked, black and white police car. Defendant had his headlights on at that time. When Officer Esko's police car turned around to follow defendant, defendant increased his speed. Defendant turned north on Cerritos Avenue and accelerated to more than 60 miles per hour. Cerritos Avenue is a residential street with one lane in each direction. Defendant turned east on 7th Street, then north on Orange Avenue, a residential street with one lane in each direction. His headlights were off. Officer Esko lost sight of defendant. However, Long Beach Police Department Helicopter Officer Athnasios Megas observed defendant on Orange Avenue and pursued him in the helicopter. Officer Megas shined the helicopter light on defendant. Defendant traveled on Orange Avenue at 60 miles per hour. The speed limit was 25 miles per hour. At 7th Street and Orange Avenue, defendant narrowly missed hitting Keyanoosh Ghamari, who was pulling out of a

parking lot. Ghamari followed the Corvette. Defendant did not stop for stop signs. Defendant kept his headlights and taillights off, except for occasionally turning them on briefly. Defendant never braked. Failing to stop for a red light, defendant turned westbound onto 10th Street, nearly hitting a vehicle lawfully stopped at the intersection. At an excessive rate of speed, defendant made a sharp turn north onto Alamitos Avenue, almost hitting Adrian Lopez who was in a Toyota on Alamitos Avenue. It seemed to Lopez the Corvette was traveling at 80 to 90 miles per hour when it missed the Toyota by inches.

Defendant accelerated on Alamitos Avenue to 90 miles per hour. Morton was in a Mercedes Benz going west on Anaheim Street. At the intersection of Anaheim Street and Alamitos Avenue, the traffic on Anaheim Street had a green light. Morton drove into the intersection. Without stepping on his brakes when approaching the intersection, defendant ran the red light on Alamitos Avenue at 90 miles per hour, and struck the Mercedes Benz in the center of the car, flipping the car two to three times in the air, killing Morton.

DISCUSSION

Mistake of Fact Defense

Defendant contends the trial court prejudicially erred in failing to instruct sua sponte in the language of CALJIC No. 4.35,[4] that an actual mistake of fact, even though unreasonable,

---

[4] CALJIC No. 4.35 provides: "An act committed or an omission made in ignorance or by reason of a mistake of fact which disproves any criminal intent is not a crime. [¶] Thus a person is not guilty of a crime if [he] [she] commits an act or omits to act under an actual [and reasonable] belief in the existence of certain facts and circumstances which, if true, would make the act or omission lawful." The Use Note to CALJIC No. 4.35 states: "In specific intent or mental state crimes, delete the bracketed phrase 'and reasonable.' Mistakes of fact, however, must be reasonable to negate general criminal intent."

can negate the specific intent required for felony evading a peace officer and felony murder based on felony evading a peace officer.[5] We conclude no prejudicial error occurred.

Defendant testified as follows. On June 23, 2001, he had two drinks at a restaurant near his house. He left the restaurant in his Corvette. When he was on Ocean Boulevard and Alamitos Avenue, he decided to go home, which was only a few blocks away. He saw Officer Clark on Ocean Boulevard talking to the driver of a stopped vehicle, but Officer Clark did not tell him to pull over or try to wave him over to the curb. Officer Clark did not follow him on his motorcycle. He did not take a circuitous route. Officer Clark's testimony was "completely false." He mistakenly turned the wrong way onto 2nd Street. He tried to turn around on 2nd Street at Falcon Avenue. As he was making the turn, he heard someone scream at him to get out of the car or I'll shoot you in the head. He believed he was being carjacked. He did not realize the person shouting at him was Officer Clark. Officer Clark's testimony concerning this encounter on 2nd Street and Falcon Avenue was not true. He fled in panic. The last thing he remembered was turning the wrong way onto Esperanza Avenue. He had no memory of how he got to the intersection of Alamitos Avenue and Anaheim Street. He never turned his headlights off. He saw a vehicle chasing him, which he thought was the carjacker. He did not see Officer Esko. He saw that he had a green light on Alamitos Avenue and then a light flashed in his eyes which completely blinded him. He hit the brakes when the light blinded him. He believed he had a green light when he entered the intersection. He never saw the Mercedes Benz. He was injured in the crash. He did not tell the hospital personnel that someone had tried to carjack him.

---

[5] To the extent defendant contends he requested an actual but unreasonable mistake of fact instruction in the trial court, the record does not support the contention. The only mistake of fact instruction defendant requested was a reasonable mistake of fact instruction. When defendant requested an instruction in the language of CALJIC No. 4.35, he explained that his defense to the implied malice element of the murder charge was he reasonably believed Officer Clark was a carjacker. Defendant also requested a pinpoint instruction: "Unless you believe beyond a reasonable doubt that [defendant] knew or reasonably should have known that [O]fficer Clark was a police officer[,] you may not find him guilty of the crimes of murder or evading a police officer with willful disregard." Both requests were denied.

The trial court instructed the jury that the crimes of evading a peace officer causing death and evading a peace officer, included the element that defendant specifically intended to evade a police officer when he fled or attempted to evade the police officer.[6]

The trial court further instructed the jury in the language of CALJIC No. 8.32: "The unlawful killing of a human being, whether intentional or accidental, which occurs during a commission or attempted commission or is the direct causal result of the crime of evading an officer with willful, wanton disregard is murder of the second degree when the perpetrator had the specific intent to commit that crime. [¶] The specific intent to commit evading an officer with willful, wanton disregard and the commission or attempted commission of such crime must be proved beyond a reasonable doubt."

The trial court further instructed the jury in the language of CALJIC No. 3.31: "In the crimes charged in count one, two and six, namely, murder, evading an officer, causing death and evading an officer with wanton, willful disregard, there must exist a union or joint

---

[6] The trial court instructed the jury in the language of CALJIC No. 12.86 (1999 Revision): "In order to prove a violation of Vehicle Code section 2800.3 [felony evading [a peace] officer causing death], each of the following elements must be proved: [¶] 1. A person[,] while operating a motor vehicle[,] willfully fled or otherwise attempted to elude a pursuing peace officer; [¶] 2. The person did so with the specific intent to evade the pursuing peace officer; [¶] 3. The peace officer's vehicle exhibited at least one lighted red lamp visible from the front; [¶] 4. The person saw or reasonably should have seen the red lamp; [¶] 5. The peace officer's vehicle sounded a siren as reasonably necessary; [¶] 6. The peace officer's motor vehicle was distinctively marked; [¶] 7. The peace officer's motor vehicle was operated by a peace officer wearing a distinctive uniform; and [¶] 8. The flight from or the attempt to elude a pursuing peace officer was a cause of [death] to another person." The trial court also instructed the jury in the language of CALJIC No. 12.85 (1999 Revision): "In order to prove a violation of Vehicle Code section 2800.2, subdivision (a), each of the following elements must be proved: One, a person[,] while operating a motor vehicle[,] willfully fled or otherwise attempted to elude a pursuing peace officer; two, the person did so with the specific intent to evade the pursuing peace officer; three, the peace officer's vehicle exhibited at least one lighted red lamp visible from the front; four, the person saw or reasonably should have seen the red lamp; five, the peace officer's vehicle sounded a siren as reasonably necessary; six, the peace officer's motor vehicle was distinctively marked; seven, the peace officer's motor vehicle was operated by a peace officer wearing a distinctive uniform; and eight, the

operation of act or conduct and a certain specific intent in the mind of the perpetrator. [¶] Unless this specific intent exists, the crime to which it relates is not committed. The specific intent required is included in the definitions of the crimes set forth elsewhere in these instructions."

Defendant argued to the jury: "[F]elony murder . . . is a killing that occurs as a result of felony evasion, but requires the specific intent to commit the felony evasion. So if you're evading a police officer and you know it, [and] the manner in which you evade the police officer, and you know it, is with wanton disregard, well, then, you're guilty of felony murder. [¶] So the question here is, is there a reasonable possibility that [defendant] did not know that [Officer] Clark was a police officer, because if there is a reasonable possibility that [defendant] did not know that fact, then there is a reasonable doubt in the case as to murder. [¶] Because you have to specifically intend to commit the crime of felony evasion, which has as one of its essential elements that [defendant] knew or reasonably should have known that [Officer] Clark was a police officer."

Assuming without deciding that the trial court erred in not instructing the jury as to an unreasonable mistake of fact, we conclude any error was not prejudicial, on two grounds. First, the jury necessarily found defendant knew the person who pointed the gun at him when he was making the turn on 2nd Street and Falcon Avenue was a police officer, not a carjacker, because the jury convicted defendant of evading a peace officer causing death and evading a peace officer. Those convictions required a specific intent to evade a police officer. Specific intent to evade a peace officer requires a belief the individual evaded is a police officer. The evading convictions establish the jury necessarily, unanimously, and beyond a reasonable doubt found defendant knew Officer Clark was a police officer and not a carjacker. The jury did not believe defendant's testimony that he mistakenly thought Officer Clark was a carjacker. Thus, had the jury been instructed in the language of CALJIC No. 4.35, it is not

---

driver of the pursued vehicle drove the vehicle in a willful or wanton disregard for the safety of persons or property."

reasonably likely the jury would have acquitted defendant of evading a peace officer by reason of an unreasonable mistake of fact.

Second, the evidence was overwhelming defendant knew Officer Clark was a police officer and not a carjacker. Defendant acknowledged that, shortly after he left the restaurant, he saw a motorcycle officer talking to the driver of a vehicle on Ocean Boulevard. Officer Clark testified as follows: He observed defendant driving too fast on Ocean Boulevard. When defendant saw Officer Clark, he slowed down. Officer Clark tried to wave defendant over to the curb. Officer Clark and defendant made eye contact. Officer Clark got within seven feet of defendant. Defendant sped away instead of stopping. Officer Clark pursued defendant with his motorcycle lights flashing and siren on. Defendant did not pull over. Rather, defendant drove at excessive speeds, took a circuitous route, and went the wrong way on a one-way street. All this evidence overwhelmingly established that defendant knew Officer Clark had seen him speeding on Ocean Boulevard and tried to stop him, defendant sped away to avoid the stop, defendant knew Officer Clark pursued him, and defendant tried to elude Officer Clark. All of this occurred before defendant was confronted by the alleged carjacker. Officer Clark further testified that, when he found defendant trying to turn around on 2nd Street and Falcon Avenue after hitting two vehicles, he drew his gun and told defendant it was over and stop, or stop or I'll shoot. Officer Clark got within six feet of defendant. Officer Clark unmistakably appeared to be a police officer. A resident of the neighborhood observing from his apartment window recognized that Officer Clark was a police officer. Defendant pretended he was complying with Officer Clark's demand but, instead of complying, sped away. Officer Clark pursued him. Another police officer, Officer Esko, pursued defendant. A driver he had nearly hit pursued defendant. Defendant engaged in evading tactics, including accelerating to extremely high speeds, turning his headlights off, driving a circuitous route, and going the wrong way on a one-way street. All the foregoing is overwhelming evidence defendant knew that Officer Clark, whom he had evaded on Ocean Boulevard, had caught up with him on 2nd Street. By that point, the stakes had gotten much higher: defendant had not simply been speeding and driving under the influence, he had also evaded an officer, driven recklessly, and

hit two vehicles. The evidence is undisputed defendant drove at high rates of speed on narrow residential streets, made wild turns, and ran red lights and stop signs. He put everything and everyone in his path at risk of death and destruction. The overwhelming evidence concerning the entire course of conduct establishes defendant's conduct was not the result of a mistake of fact concerning the person with a gun who had tried to stop him on 2nd Street. Had the unreasonable mistake of fact instruction been given, the verdicts would have been no different.

Necessity Defense

Defendant contends the trial court erred in refusing to instruct in the language of CALJIC No. 4.43[7] concerning necessity. We conclude no prejudicial error occurred.

In connection with the hit-and-run count, and each count that required an infraction of the Vehicle Code as the proximate cause of the injury, the defense was that defendant had been required to commit the infractions, such as speeding or running a red light, because he was evading a carjacker who had put defendant's life in peril. Defendant requested an instruction in the language of CALJIC No. 4.43. The trial court ruled the defense of necessity did not apply. The trial court stated: "[T[he elements of a necessity defense are that the acts charged must have been done to prevent a significant evil, as you stated in your requested instruction; two, there must have been no adequate, you wrote, legal alternative to the commission of the act. [¶] Well, certainly, that's one I find to be inapplicable to this case. There were many legal

---

[7] CALJIC No. 4.43 states: "A person is not guilty of a crime when [he] [she] engages in an act, otherwise criminal, through necessity. The defendant has the burden of proving by a preponderance of the evidence all of the facts necessary to establish the elements of this defense, namely: [¶] 1. The act charged as criminal was done to prevent a significant and imminent evil, namely, [a threat of bodily harm to oneself or another person] [or] [_____]; [¶] 2. There was no reasonable legal alternative to the commission of the act; [¶] 3. The reasonably foreseeable harm likely to be caused by the act was not disproportionate to the harm avoided; [¶] 4. The defendant entertained a good-faith belief that [his] [her] act was necessary to prevent the greater harm; [¶] 5. That belief was objectively reasonable under all the circumstances; and [¶] 6. The defendant did not substantially contribute to the creation of the emergency."

alternatives. For example, the defendant could have given up the car. The defendant could have used his cell phone in his glove compartment and called 911 for help. The defendant could have driven to the police station. [¶] All of those were viable alternatives other than driving at 90 miles an hour with his lights off. The third element is the harm must not be disproportionate to the harm avoided. [¶] The harm, the potential harm or even the actual harm is tremendously disproportionate to carjacking. We are talking about the death of a human being. The accused must have a good faith belief that act was necessary to prevent greater harm. [¶] I'm going to give the defendant the benefit of the doubt that he had a good faith belief that the police officer was trying to carjack him; although, I think there is evidence contrary to that predicate finding because the testimony showed that the area had a lamppost right where Office Clark was, and according to defense theory of the case, the defendant was not under the influence, and all he had to do was look and see it was a police officer. [¶] If he's not under the influence, the man is in full uniform, he's got a motorcycle that's marked police, there's obviously -- and you have a lamppost right there as testified to by the witness, the issue of good faith belief is also questionable, but I'll give that to the defendant. [¶] The belief must be objectively reasonable under all circumstances; not under the defendant's state of mind. Now that's an objective test. Based on an objective test, if the defendant is not under the influence, the lamppost is there, the officer's in uniform, the motorcycle is marked, it is not objectively reasonable that he believed he was being carjacked, and the defendant must not have substantially contributed to the creation of the emergency, and most certainly he did by driving with his lights out at a tremendous rate of speed. [¶] So for all those reasons I find the defense of necessity does not apply."

The trial court stated: "The necessity defense is based on public policy. The courts have said [the] necessity defense applies in a very, very limited area because it is a complete defense."

Defendant's necessity defense was based on his claim of mistake of fact that he was being carjacked. Even if the trial court erred in failing to give the necessity instruction, the error was harmless for the same reasons the error, if any, in failing to give the mistake of fact instruction was harmless.

Exclusion of Linda Hall's Testimony

Defendant offered testimony of Linda Hall that Officer Clark had stopped her in 1996, and Officer Clark was so angry with her for not stopping when he had waved her over with his flashlight, that he was "verbally abusive" and "was actually jumping up and down." Defendant offered the testimony as evidence of a common design or scheme concerning "what [Officer Clark] does in response to the failure to respond to that waving of the flashlight. Because in [defendant's] case, the very same thing happened." "Officer Clark acted with [defendant] exactly the same way he initially acted with Linda Hall. [¶] . . . [¶] . . . He got angry and acted precipitously, as a result of which [defendant] took off and got into a fatal accident . . . ." The trial court denied the request to admit Hall's testimony. Defendant contends the trial court erred. Rulings excluding evidence are reviewed for abuse of discretion.

First, the 1996 incident was not relevant to any issue in the case. Officer Clark's behavior was not an issue. The issue was whether defendant, knowing Officer Clark was a police officer, specifically intended to evade him. Further, the testimony did not go to Officer Clark's credibility concerning whether he told defendant, "stop or I'll shoot," because Officer Clark's credibility on that point was not in issue. Officer Clark acknowledged he might have said, "stop or I'll shoot." He testified he was scared, he drew his gun and pointed it at defendant, and his adrenalin was pumping. This testimony was consistent with defendant's testimony Officer Clark was angry and shouted at defendant. A neighbor confirmed it. The prosecutor did not present evidence to dispute that Officer Clark had shouted, "stop or I'll shoot."

To the extent defendant contends the testimony was admissible under Evidence Code section 1101, subdivision (b), we disagree with the contention even if the testimony had some relevance. Evidence Code, section 1101 provides: "(a) Except as provided in this section and in Sections 1102 [and] 1103 . . . , evidence of a person's character or a trait of his or her

character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act. [¶] (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness." "Evidence of a common design or plan is admissible to establish that [a person] committed the *act* alleged." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 394, fn. 2.) " '[A]cts [that are] independent of one another and apparently spontaneous in each instance'" are inadmissible to demonstrate a common design or plan. (*Id*. at p. 396.) "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts . . . ." (*Id*. at p. 403.)

Two separate incidents of anger when a motorist failed to stop do not indicate the existence of a plan or common design. Indeed, defendant fails to articulate the plan or design of Officer Clark evidenced by these isolated outbursts of anger. Separated by five years, the two acts were independent and spontaneous. Accordingly, the trial court's ruling that Hall's proffered testimony was not admissible as evidence of a common design or plan under Evidence Code section 1101, subdivision (b) was not an abuse of discretion.

To the extent defendant contends the testimony was admissible under Evidence Code section 1105, the contention was waived by defendant's failure to seek admission of the evidence under Evidence Code section 1105 at trial. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1178.) Nor was counsel ineffective for failing to seek admission of the evidence under Evidence Code section 1105, because the evidence was not admissible under Evidence Code section 1105. Evidence Code, section 1105 provides: "Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the

habit or custom." " 'Habit ' or 'custom' is often established by evidence of repeated instances of similar conduct." (*People v. Memro* (1985) 38 Cal.3d 658, 681.) "The question whether habit evidence is admissible is essentially one of threshold relevancy . . . ; it is addressed to the sound discretion of the trial court." (*People v. McPeters* (1992) 2 Cal.4th 1148, 1178.) Once again, we fail to discern any relevance of this habit or custom evidence. In any event, evidence of two isolated instances of anger when a motorist failed to stop when waved over is not evidence of a habit or custom. Evidence Code section 1105 did not apply.

Cumulative Effect of Error

Defendant contends the cumulative effect of the instructional and evidentiary errors requires reversal. We have already concluded the two asserted instructional errors were harmless, singly or together, and there was no evidentiary error.

Penal Code Section 654 Error

Defendant contends the trial court erred in sentencing him to a consecutive term for hit-and-run driving. Defendant contends the sentence for hit-and-run driving should have been stayed pursuant to Penal Code section 654, because the hit-and-run driving was part of the evading which concluded with the deadly crash into the Mercedes-Benz. Since he was sentenced for the murder of Morton, defendant argues he could not also be sentenced for failing to stop after hitting the other two vehicles earlier in the pursuit. We disagree with the contention.

Penal Code section 654 provides in pertinent part: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." " ' "[Penal Code s]ection 654 has been applied not only where there was but one 'act' in the ordinary sense . . . but also

where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of [Penal Code] section 654." [Citation.] [¶] Whether a *course of criminal conduct* is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective of the actor*. If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'" (*People v. Beamon* (1973) 8 Cal.3d 625, 637.) When a defendant "has embarked upon a course of conduct wherein he may be deemed to have entertained multiple criminal objectives none of which are merely incidental to any other, the meaning of 'act or omission' has been construed in a manner consistent with that multiple objective and what may appear on the surface to be a single act may embody separately punishable violations. We must, accordingly, give heed to [a defendant's] objectives when they can be ascertained." (*Id*. at p. 638.) "If [the defendant] entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*Id*. at p. 639.) A course of conduct, even though directed to one objective, may also give rise to multiple punishment if divisible in time. (*Ibid*.) "This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken." (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.)

The trial court's determination under Penal Code section 654 is upheld if supported by substantial evidence. (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085.)

Defendant was convicted of hit-and-run driving as alleged in the information: "On or about June 23, 2001, . . . [defendant] was the driver of a vehicle involved in an accident resulting in damage to property, who did unlawfully fail to stop the vehicle at the scene of the

accident and comply with subsection(s) ((a)) of Vehicle Code section 20002[]."[8] Defendant was also convicted of second degree murder in violation of Penal Code section 187, in that he killed Morton "[with malice aforethought] [or] [during the commission or attempted commission of the crime of Evading an Officer with Willful Wanton Disregard] . . . ."

The trial court found that "the collision into the two parked cars and leaving that scene" was "basically a different incident" from the fatal collision. "The defendant's actions [which resulted in Morton's death] were beyond the pale of what is considered reckless and dangerous under the law."

Substantial evidence supports the trial court's determination under Penal Code section 654. There was evidence defendant entertained multiple objectives while engaging in the course of conduct that resulted in the fatal crash. The hit-and-run offense arose from defendant's failure to stop at the scene of his collision into two parked cars at Falcon Avenue and 2nd Street and leave the required information so that the owners of the cars could locate defendant. There was evidence that defendant did not stop when he hit the two cars but, instead, made a turning maneuver and drove away from the scene. Even though running from the scene of the collision on 2nd Street occurred during defendant's reckless course of evading conduct that resulted in Morton's death, defendant had an independent purpose in leaving the scene without complying with the obligation to notify the owners of the damaged vehicles. Moreover, there was evidence some time had elapsed after the crash before defendant left the scene.[9] Thus, to the extent leaving the scene was also directed to the evading objective which resulted in Morton's death, defendant had had time to reflect and decide whether or not to

---

[8] Vehicle Code section 20002, subdivision (a) provides that the driver of any vehicle involved in an accident resulting only in property damage shall immediately, safely stop the vehicle and either notify the owner of any other vehicle involved of the driver's name and address or conspicuously place on the damaged vehicle written notice giving the driver's name and address.

[9] Ten seconds elapsed before Officer Clark reached the scene. Defendant did not drive away until after Officer Clark had gotten off his motorcycle, walked over to defendant, and had a conversation with defendant about pulling over.

terminate his reckless behavior. Instead, he recommenced his reckless evading conduct. These circumstances are an additional justification for the imposition of separate punishments under Penal Code section 654. The trial court properly concluded Penal Code section 654 did not apply to the hit-and-run conviction.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GRIGNON, J.

We concur:

TURNER, P. J.

MOSK, J.